APPENDIX

Decision of Supreme Court of Wisconsin - December 7, 1981 A1

Decision of Court of Appeals of State of Wisconsin - July 21, 1981 A3

Order For Judgment - Circuit Court Milwaukee County, Wisconsin - March 17, 1980 A20

Partial Trial Transcript A23

Office of the Clerk - Supreme Court - State of Wisconsin.

To: David A. Melnick
Jacobson, Sodos, Melnick & Krings
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Sydney M. Eisenberg
1131 West State Street
Milwaukee, Wisconsin 53233

Ray T. McCann
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

Madison, December 7, 1981

Hon. James P. Fiedler
Circuit Court of Iowa County
County Courthouse
Dodgeville, Wisconsin 53233

The Court today announced an order in your case as follows:

No. 80-737 Crowley v. Eisenberg

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Sydney M. Eisenberg, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

MARILYN L. GRAVES

Clerk of Supreme Court

COURT OF APPEALS - DECISION - DATED AND RELEASED July 21, 1981. A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 80-737

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

GEORGE D. CROWLEY

Plaintiff-Respondent

v.

SYDNEY M. EISENBERG

Defendant-Appellant

APPEAL from a judgment of the circuit

court for Milwuukee County: JAMES P. FIEDLER, Judge. Affirmed.

, Before Decker, C.J., Cannon, J., and Hanley, Reserve Judge.

HANLEY, Reserve Judge. This appeal arises out of an action commenced by George D. Crowley (respondent herein), to recover attorney's fees owing from his representation of Sydney M. Eisenberg (appellant herein), in a federal criminal trial where it was found that Mr. Eisenberg was guilty of three counts of willfully filing a false income tax return. Mr. Eisenberg counterclaimed against Mr. Crowley for legal malpractice.

On December 5, 1979, a jury found for Mr. Crowley on his claim for attorney's fees, and against Mr. Eisenberg on the malpractice counterclaim.

After hearing motions after verdict, the trial judge ruled that there was credible

evidence to support the verdict answers, with the exception of the answer to question 1a, regarding the amount owed by Mr. Eisenberg for Mr. Crowley's legal services, which was amended by stipulation from $10,000 to $7,000. Judgment was ordered against Mr. Eisenberg on March 17, 1980. The counterclaim was dismissed on the merits. Mr. Eisenberg appeals.

The following issues are presented on this appeal:

1. Were the motions after verdict timely filed by the respondent in his defense of the appellant in the criminal case?

2. Were the instructions submitted by the trial court to the jury erroneous?

3. Was the special verdict submitted to the jury erroneous?

4. Did the trial court err in refusing to adjourn the motions after verdict until a

transcript had been prepared?

5. Did the trial court err in not ordering a new trial based on an improper closing argument by respondent's counsel?

6. Did the trial court err in refusing to allow the appellant to conduct his own cross-examination?

7. Is there any credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant?

Timeliness of Motions

Appellant contends that the trial court erred in ruling, as a matter of law, that respondent's motions after verdict, on behalf of appellant in his criminal trial, were timely flied.

Although the appellant raised eleven separate issues in his post-trial motions, the issue of the appropriateness of the trial

court's ruling on the timeliness of respondent's motions after verdict was never raised.

The Wisconsin Supreme Court has consistently held that to preserve a right to appeal, one must first raise the issue in the trial court. The burden is upon the party that alleges error to establish in the record that the error was specifically called to the attention of the trial court. A failure to make a timely objection constitutes a waiver of the objection. Terpstra v. Soiltest, Inc., 63 Wis. 2d 585, 594, 218 N.W. 2d 129, 134 (1974).

Pursuant to the above authority we hold that the issue is not properly before this court.

Instruction Regarding Newspaper Article

The appellant has alleged that the jury was not properly instructed regarding a newspaper

article concerning him which appeared in The Milwaukee Journal during the course of the trial. However, he has failed to incorporate the article in the record on this appeal. He is requesting the court to overturn a jury verdict and a decision of the trial court without submitting the article to the court.

In Nimmer v. Purtell, 69 Wis. 2d 21, 230 N.W. 2d 258 (1975), the court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record was made of the final arguments, however, and the court stated:

> [W]ith no record this court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absent some showing somewhere in the record, the court cannot consider the alleged error. Borowske v. Integrity Mut. Ins. Co., (1963) 20 Wis. 2d 93, 98, 121 N.W. 2d 287. Purtell, 69 Wis. 2d at 40, 230 N.W. 2d at 268.

The appellant made no request for any instruction regarding the newspaper article.

He made no suggestion to the trial court other than to ask the jury if they had read the article and to instruct that they pay no attention to it.

The court did question the jury and nine members stated that they had read the article. On individual questioning by the trial court, all nine responded that they could put the article out of their minds in reaching a verdict.

If the appellant wanted anything additional he should have requested it at the time. If he felt that the article was damaging and the poll of the jury insufficient, he should have made an objection and moved for a mistrial. He elected to take his chances on a jury verdict.

In Micke v. Jack Walters & Sons Corp., 70 Wis. 2d 388, 392, 234 N.W. 2d 347, 349 (1975), the Court stated:

> There is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury. Therefore error cannot be predicated upon the omission. As this court has held: "Where instructions are incomplete, and do not cover a point that ought to be covered, this court will not reverse unless a timely request for appropriate instructions has been made to the trial court." (Quoting Grinley v. Eau Galle, 274 Wis. 177, 179, 79 N.W. 2d 797, 798 (1956)).

Here an instruction conference was held by the court in chambers, and the proposed jury instructions were approved by counsel for the parties.

We conclude that appellant's failure to object to the instructions precludes him from raising an objection to the instruction on this appeal.

The appellant also argued that the jury was not properly instructed on the difference between his gross income and his net income. Defendant's income record was a factor in establishing his damages.

Appellant himself, through the questioning of his attorney, referred to his 1975 Income Tax return.

He was then questioned by respondent's attorney, Mr. Melnick:

> Q I show you what has been marked as plaintiff's exhibit 16, which purports to be the tax return of Eisenberg subsidiaries and ask you doesn't the gross receipt show nine hundred thousand seventy six dollars and seventy one cents?
>
> A It is not from law practice.

The return was admitted into evidence without objection. At no time was a motion for a mistrial made. Appellant also failed to submit an instruction to the court. In ruling on a similar issue in Lipinski v. Pakulski, 62 Wis. 628, 633-34, 215 N.W. 2d 468, 471 (1974), the court said:

> After the jury was instructed, the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated that they were satisfied with the

instructions as given.

> Under these circumstances, an appellant is precluded on appeal from arguing that other additional instructions should have been given. The instructions that were given were not erroneous. Even under the plaintiff's theory of the case, the most that could be said is that they were incomplete. We have however, repeatedly stated:
>
> "Where instructions are incomplete and do not cover a point that ought to be covered, this court will not reverse unless timely request for appropriate instructions has been made to the trial court. Grinley v. Eau Galle, (1956), 274 Wis. 177, 79 N.W. 2d 797." Carson v. Pope, (1961), 15 Wis. 2d 300, 306, 112 N.W. 2d 693 [,696.]

We hold that the appellant waived any alleged error in the trial court's instructions to the jury by not objecting to the instructions given or offering his own additional instructions.

Form of Special Verdict

Appellant contends that the form of the special verdict was erroneous. Neither at the time the special verdict was presented to

counsel nor in his motions after verdict did the appellant raise the issue he raised on appeal. Both attorneys for the parties agreed with the court on the form of the special verdict as submitted to the jury.

In Roach v. Keane, 73 Wis. 2d 524, 243 N.W. 2d 508 (1976), the court was faced with an almost identical situation. There the appellant also failed to object to the special verdict before it was submitted to the jury, and neglected to raise the issue on motions after verdict. The court held that under these circumstances, there can be no question that the defendant is not entitled to assert error on appeal. Id. at 535, 243 N.W. 2d at 515.

We conclude the appellant is precluded from complaining now about the special verdict form.

Adjournment of Motions After Verdict

Appellant asserts that the trial court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. However, he fails to show with any degree of specificity what particular error the trial judge made in ruling on the post-trial motions because a transcript was not available to him at that time.

Appellant has not shown any prejudicial effect due to the transcript not being available to the trial court. Appellant has not asked for any particular relief in his brief because of this alleged error.

Under the circumstances we conclude that the trial court did not abuse its discretion in refusing to adjourn the motions after verdict until the transcript was available.

Closing Argument of Counsel

The appellant claims that counsel for

the respondent, in his closing argument, referred to appellant as "being guilty of murder." The claim is misleading and incorrect. The record discloses that respondent's counsel, in his closing argument, stated to the jury:

> Mr. Eisenberg is not the kind to leave a stove [sic] unturned and he is smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally [i]n the sense only how he conducts his affairs; because, he is smart. Transcript of December 5, 1979 at 30-31

At no time was any objection or a motion for a mistrial made by the appellant.

In Zweifel v. Milwaukee Automobile Mutual Insurance Co., 28 Wis. 2d 249, 256, 137 N.W. 2d 6, 11 (1965), the Court held that if particular arguments were thought improper, it was incumbent upon counsel to move for a mistrial before the jury returned its verdict or else the complaint was deemed waived.

We hold the appellant waived any alleged error in the closing argument by failing to move for a mistrial.

Cross-Examination of Witnesses

The Appellant now, for the first time, has raised an issue of whether it was error for the trial court to deny him an opportunity to cross-examine witnesses.

There is nothing in the record indicating that a request was made to the trial court to permit appellant to conduct cross-examination. His attorney, Mr. McCann, was allowed to cross-examine witnesses. Appellant has cited no authority that both a party and his attorney can conduct cross-examination.

The absence of a request to the court on the record and the absence of this issue on motions after verdict are fatal to the appellant. As the court said in Platta v. Flatley, 68 Wis. 2d 47, 63, 227 N.W. 2d 898, 907 (1975):

"The plaintiff alleges prejudicial error on the part of the trial court in not permitting the plaintiff to pursue certain lines of cross-examination. Not only are the plaintiff's allegations of error unclear but they are not raised on posttrial motions. The objection comes too late."

We refuse to consider this issue which is raised for the first time on appeal.

Question of Credible Evidence

Section VII of the appellant's brief sets forth his version of the facts which he was not able to prove to the satisfaction of the court or jury.

Both Mr. Crowley and Mr. Manning testified about the trial strategy, the fact underlying the jury waiver by appellant, and the decision not to call appellant as a witness.

The appellant has not presented a proper issue for appeal in this section. All of his

contentions were controverted by respondent's experts. His experts were controverted by respondent's experts. The standard for overturning a jury verdict on a factual question is well established. In Meurer v. ITT General Controls, 90 Wis. 2d 438, 450-51, 280 N.W. 2d 156, 162-63 (1979), the court said:

> The standard of review of a jury verdict is that it will not be upset if there is any credible evidence to support it. The evidence will be viewed in the light most favorable to the verdict. May v. Skelley Oil Co., 83 Wis. 2d 30, 35, 264 N.W. 574 (1978); Nelson v. Travelers Ins. Co., 80 Wis. 2d 272, 282, 283, 259 N.W. 2d 48 (1977). This is especially true where, as here, the verdict has the approval of the trial court. Upton v. Tatro, 68 Wis. 2d 562, 570, 229 N.W. 2d 691 (1975). The credibility of witnesses and the weight given to their testimony are left to the judgment of the jury, and where more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. Roach v. Keane, 73 Wis. 2d 524, 536, 243 N.W. 2d 508 (1976). On Appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury

could have but did not reach. Coryell v. Conn, 88 Wis. 2d 310, 317, 276 N.W. 2d 723 (1979).

Under the above standards of review we are satisfied that there is ample credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed.

By the Court - Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

GEORGE D. CROWLEY

Plaintiff

ORDER FOR JUDGMENT

vs.

Case #455-500

SYDNEY M. EISENBERG

Defendant

The above captioned matter having come on for jury trial on the 26th day of November, 1979, and the jury having rendered it's verdict on the 5th day of December, 1979; counsel for the parties having prepared and filed their respective motions after verdict, and having appeared for oral arguments on the 7th day of March, 1980, the plaintiff appearing by his attorneys, Jacobson, Sodos, Melnick and Krings, S.C., by David Melnick and Alan Derzon, the defendant appearing by his attorney, Ray T. McCann; and the Court having heard argument, considered the evidence of-

fered at the trial herein, and determined that there was credible evidence in the record to support the verdict answers with the exception of the answer to Question 1a which has been amended by the stipulation of counsel from Ten Thousand Dollars ($10,000.00) to Seven Thousand Dollars ($7,000.00),

NOW, THEREFORE, upon all the records, files and proceedings herein,

IT IS ORDERED:

1. That the Plaintiff be granted judgment against the defendant in the sum of Fourteen Thousand Eight Hundred and Thirty-Eight Dollars ($14,838.00) with interest thereon at the rate of 7% per annum together with their costs and disbursements.

2. That the counterclaim of the defendant against the plaintiff shall be dismissed upon the merits.

Let judgment be entered accordingly.

Dated this 17th day of March, 1980.

BY THE COURT:

/s/
James P. Fiedler
Circuit Court Judge

a motion.

Q You disagree with the Judge's decision in the case?

A No, no.

Q What did he say about filing the motions?

THE COURT: Just one minute.

(Conference in chambers.)

THE COURT: Let the record show this is a conference held in the absence of the jury. Present are both counsel and both parties to this action. The Court has concluded that the questioning by Mr. McCann, both of Mr. Manning and of Mr. Crowley, relate to the motion filed with the Federal Court on the grounds for a new trial on the grounds of newly discovered evidence, has been completely misleading.

I have read Defendant's Exhibit Two, which was received in evidence yesterday, and

which constitutes the decision of Judge Wood relating to those motions. And at page fifteen and sixteen Judge Wood differentiates between the timely filing of that motion for different reasons than what is appearing before this jury.

At page fifteen at the bottom thereof Judge Wood uses this langugage: "If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict or a finding of guilty," and at the top of page sixteen, "is to be granted when in the interests of justice."

He goes on to state that a motion for new trial based upon newly discovered evidence may at the end of a seven day period would be granted and conditions that he then there lists. That's entirely different from the impression that is being given to this jury on the basis of these questions.

These questions by Mr. McCann to both of these witnesses has been designed, it seems to me, to make it appear that the motion was not timely filed, and that is not the fact based on Judge Wood's decision.

Now, I want the suggestions of counsel, starting with Mr. Melnick, as to how that can be cleared up.

Mr. Melnick?

MR. MELNICK: I think that -- I think an order from the Court indicating the facts and circumstances, indicating that the jury disregard the questions that came before, and make the statement simply the way the Court had made it in chambers would clarify the situation so we don't have any further problems, and hopefully the questions like that won't come up again.

THE COURT: Mr. McCann.

MR. McCANN: I think the questions

that were asked were proper questions, and Mr. Manning himself said he disagreed to the Judge's decision.

Q Where on page eleven forty-six?

A I just read it, Mr. McCann.

Q Now, that rule refers to a written motion, does it not?

A I don't see it written in here at all.

MR. MELNICK: I am going to move that this all be stricken.

THE COURT: The Defendant's Exhibit Two, which has been identified as post-trial motions of the Defendant there is a filing stamp of the U.S. District Court of December 10, 1976, the judgment or -- strike that.

The date of sentencing, June 20th, 1976. Defendant's Exhibit Eight, which has been received in evidence, relates to the Federal Rules and provides for the filing

of a motion based on newly discovered evidence within two years after judgment, and further provides that a motion for a new trial based on any grounds other than newly discovered evidence must be within seven days after verdict or finding of guilty such further time as the Court may find during the seven-day period.

The only motion filed on behalf of the Defendant for a new trial was that on the grounds of newly discovered evidence. The Court finds as a matter of law that was timely filed. The objection is sustained. This evidence is irrelevant.

Proceed.

recall his testimony, I am sure. At any rate you are to completely disregard the testimony of Frieda Scheuer, who testified yesterday, has been ordered stricken; and you are to totally disregard the testimony of Mrs.

Scheuer. Finally, Members of the Jury, it has been called to my attention that the article appeared in Milwaukee Journal concerning Mr. Eisenberg. Did any of you read that article? If so, would you raise your hand up, please. Let the record show that nine members of the Jury Panel have indicated that they read that article and that neither of the alternates indicated that they did. I will address my remarks to the nine of you who have read the article. Are there any of you who cannot completely put that article out of your mind in reaching your verdict? Let me -- in the back row, now, Mrs. Budish, you indicated that you read the article.

JUROR: Yes.

THE COURT: Do you feel, Mrs. Budish, that you can put that article out of your mind in reaching this verdict?

JUROR: It has nothing to do with this

case.

THE COURT: Horvat, Mr. Horvat, you have indicated that you read the article. Can you put the article out of your mind in reaching a verdict?

JUROR: Yes.

THE COURT: May I have your name?

JUROR: Schneider.

THE COURT: Mrs. Schneider, you have indicated that of what Ray is going to say. I wish you would hold your decision on that for the moment, because of what Ray is going to say. I -- the reason why I thought I might argue for fifteen minutes.

THE COURT: Mr. McCann.

MR. McCANN: In last night's Journal there is an article here in the Accent Section. There is a document; "Eisenberg Suspension Appeal to Court." Why that's in last night's paper, I -- don't know; because

that appeal was filed, I think, about a week or ten days ago and why they did it -- Of course, they got a right to do it. I wonder if the Court shouldn't ask the Jury whether they read it and pay no attention to it.

THE COURT: Mr. McCann, I have read the article, now. What suggestion are you making?

MR. McCANN: Well, it's a little difficult to tell, because we don't know how many read it or if any of them read it. It seems to me, without emphasizing the article, there ought to be some general instruction not to pay any attention to anything in the newspapers.

THE DEFENDANT: May I add something.

THE COURT: All right.

THE DEFENDANT: This is a situation -- First of all, the article is incorrect as to reporting of it. The only -- Your Honor, I wasn't planning to go into long testimony on

the case and I wasn't planning to argue until we saw this in the paper. There are certain things that have to be read to the Jury to get the record straight that are in evidence. I don't intend to go outside of the evidence, nor would I do anything to bring about an objection. I am not going to; if he wants to object, he can.

THE COURT: I have ruled that you may argue.

THE DEFENDANT: On this thing, we were talking about how to correct it. We don't want to move for a mistrial. We don't know what damage was done and so forth; and we thought -- and this -- I don't know how Your Honor would think it could be handled; but, if, for example, the Jury were simply asked did they -- raise your hand if you read the article, that would be one indication to you.

THE COURT: Suppose all fourteen raise their hand, what am I suppose to do?

THE DEFENDANT: If they did read it, I would assume -- I don't know, I don't know. I thought this, Judge --

THE COURT: I will handle it.

THE DEFENDANT: Let me just suggest this, what Mr. McCann said; if they did read it, we get instruction; and, if I were to read from evidence, from the matters in evidence to the Jury so that they at least -- I could describe, try to show what happened, believe the Journal or believe the evidence.

THE COURT: I will handle that article.

(End of instruction conference.)

* * *

THE COURT: Good morning Members of the Jury. We are in the last phases of this trial and I know most of you have never ....

....

A On the telephone and in person, several discussions.

Q In person, September of 1975?

A First on the telephone and then in person.

Q When in person, Mr. Eisenberg?

A I would say that I first went to see him in September of 1975.

Q In September or December?

A Oh, no, September.

Q Now, what was your understanding in September of 1975 as to what you fee agreement was?

A I understood -- what was my understanding?

Q Yes, sir.

A As a result of what was said or what I concluded?

Q What is your understanding of what that agreement was?

A My understanding was after discussion that

I was to pay Twenty Thousand Dollars for the trial and including the Court of Appeals if I had to go there; but if I had to go to the Court of Appeals, I had to add Three Thousand Dollars for briefs. Then I was to pay Thirty Thousand Dollars to go all the way through, if I had to go to the United States Supreme Court, including the petition for certiorari. If the case was dismissed on motions, which Mr. Crowley agreed to handle, I am trying to be responsive if I may, then only Ten Thousand Dollars.

Q Well, now, the motions were brought sometime in November

....

....

MR. McCANN: This motion is to have the argument on behalf of the verdict adjourned until we can get a copy of the testimony. Now, there are quite a few problems in this case and to do justice we have to have not only a copy of the testimony with Your Honor's instructions and we have done everything we possibly can do to get that because attached to our motion for an adjournment today is a xerox copy of a letter that was written to the court reporter and that letter was written December -- December 7th and I think it's very important in support of our motion. It's a letter from Mr. Eisenberg to the court reporter, December 7, 1979. "Dear Madam: My wife ordered a copy of the argument to the jury together with all of the opening and closing arguments by Mr. Melnick and my counterclaim. She stated that you

were going to call her and inform her of the bill but we have heard nothing from you. Accordingly, I am sending you my check for $500 and ordering the entire transcript as well as the argument to the jury. If more money is needed, please advise me immediately. Enclosed is a self-addressed envelope for convenience for your reply." Never heard anything from her. Then we subsequently had correspondence with her about getting out the transcript. She wrote some letters which we have attached some of them. I think they were addressed to the fact that they had taken her off some duties and she had to get out transcripts in adoption cases and couldn't do anything else. Now, that's quite a while ago and why she hasn't done it, I don't know.

Now, I submit that this is the case where we certainly ought to have the transcript before we have to argue the motions after

verdict, and I don't know what more we can do to get them. I think what should be done, the Court should order her to proceed with getting out the transcript ahead of everything else as soon as she humanly can do so and to adjourn this case for a short period of time. As soon as we have the transcript -- we get the transcript today, we would be ready to argue this case within 72 hours after we get the transcript. Without the transcript, there's going to be dispute as to what was said.

Now, as for one instance, there will be a dispute probably on this: At one time the defendant was referred to as a murderer. Now, I don't care what he is or what he will be. He's not a murderer. This is just one example I might point out, and there's some other things according to my notes and I don't claim to be the greatest notetaker in the world,

but it refreshes my recollection but I want to have the exact language and the circumstances under which it was said. We have -- I am not doing this for purposes of delay because what little experience I have had in the practice of law, the longer a case is in your office before you terminate it

...